In the

Supreme Court of the United States

October Term, 1951.

No. 75.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition filed May 26, 1951.

Reasons for Granting a Rehearing and Issuing the Writ.

1. The denial of the petition for certiorari on October 8, 1951, was an intervening circumstance of substantial and controlling effect which, in itself, created petitioner's constitutional right to question the validity of Section

1254 (1), Title 28, U. S. C., which did not accrue until this Court denied appellate review of this case by said order, whereupon said constitutional right accrued under the law declared by the Court in the decisions cited in Chapter 38, Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States, 2d Ed., and indicated in the basic rule with which said chapter begins. Thus:

> "Basic Rule—Necessity of Existing or certainly impending injury to those personal or property rights of the complaining party which are entitled to and susceptible of protection by judicial action."

It is stated in the text at page 543:

> "It results that in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal to the parties thereto, which are entitled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.'"[4]

Another intervening circumstance, of like substantial and controlling effect, was the decision of this Court in *Collins* v. *Hardyman*, 341 U. S. 651-664, on June 4, 1951—after the filing of the petition for certiorari. The opinion in said case discloses that petitioner's complaint states a cause of action under the provisions of Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C. Said decision in *Collins* v. *Hardyman* by this Court is in direct conflict with the opinion and decision of the Court of Appeals and the Federal district court.

[4]See all cases cited in this chapter.

Which intervening circumstances in connection with the record in this case showing that the illustrious but aged and ailing District Judge—though he found facts in his opinion showing the complaint stated a cause of action—(see R. 783) yet he based his decision not on the allegations of the complaint but on suspicion of the truth of the allegations—(see R. 783) which truth was established by the admissions of respondents by their motions to dismiss, and by the certified copies of the records showing the collusive judgments and proceedings by virute of which petitioner was deprived of her property and her rights under the United States Constitution and law alleged—conclusively establish the truth of said allegations. The affirmance by the Court of Appeals amounted to a most gross miscarriage of justice. Therefore, the order denying certiorari has had an effect amounting to a miscarriage of justice—which can only be corrected by setting said order aside and granting certiorari, and reviewing and reversing the erroneous judgments of the lower federal courts.

The substantial ground that the judgment of the District Court was based upon suspicion, and not upon the allegations of the record, nor on the proof conclusively establishing the truth of said allegations, is a substantial ground for rehearing available to this petitioner, though not previously presented.

The rule often stated by this Court, well reproduced in *Muskrat* v. *United States,* 219 U. S. 346, at l. c. 359, questioning the validity of Section 1254 (1), Title 28, U. S. C., necessitates the decision of the validity of said statute, the grant of a rehearing, the issuance of the writ, and reversal.

> "Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature,

> state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not."
>
> (*Muskrat* v. *United States,* 219 U. S. 346, l. c. 359.)

The foregoing operates to make this case a case of great public importance.

2. Section 1254 (1), Title 28, U. S. C., as construed and applied herein in denying the petition for certiorari, conflicts with Section 2 of Article III of the Constitution, and is therefore void.

3. Said statute, by attempting to delegate the power, if any, vested in Congress by Section 2 of Article III of the Constitution to except this case from the appellate jurisdiction of this Court, is void because Congress could not delegate said legislative power vested in it by the Constitution to this Court.

4. Section 2 of Article III of the Constitution, providing:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Congress* shall make"

was changed by Section 1254 (1), Title 28, U. S. C., as construed by the order denying certiorari, to read:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the *Supreme Court in its discretion* shall make",

which change rendered said statute, and the order herein denying certiorari based on it, void. Chief Justice Coke prayed

> "God send me never to live under the law of convenience or *discretion.*" (2 Rushworth's Collections 4).

In *Cary* v. *Curtis,* 3 Howard 236, l. c. 245, this Court ruled:

> "* the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, * * To deny this position would be to elevate the *judicial* over the legislative branch of the government, *and to give the former powers limited by its own discretion merely.*" (Italics ours.)

5. The order herein denying certiorari, and said Section 1254 (1), Title 28, U. S. C., constituted the mechanism used by this Court to keep this case out of this Court (*Darr* v. *Burford,* 339 U. S. 200, l. c. 227). Whereas, the mechanism provided by the Constitution is (Art. III, Section 2)

> "* the supreme Court shall have appellate Jurisdiction * * * with such Exceptions. * * * as the Congress shall make."

Said order and statute, because of conflict with said provisions of the Constitution, are void.

6. If Congress were given the power by the words in said sections of the Constitution

> "* with such Exceptions, * * as the Congress shall make"

to except this case from the appellate jurisdiction of this Court, then the power of Congress was exclusive and could not be delegated to this Court under the rule stated in *Williams* v. *United States,* 289 U. S. 553-581, l. c. 580:

> "* it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands,* 277 U. S. 189, 201, 202, 72 L. ed. 845, 48 S. Ct. 480." (Italics the Court's.)

And so Section 1254 (1), Title 28, U. S. C., pursuant to which by its order denying certiorari this Court excepted this case from the appellate jurisdiction of this Court, is void.

7. The provision extending the judicial power to "all" cases in the first class in Section 2 of Article III, and omitting the word "all" as to the second class, was presented for consideration to the Convention by the proposition submitted by Mr. Pinkney (Formation of the United States, p. 572) that:

> "The Jurisdiction of the supreme Court shall be extended to *all* controversies between the U. S. and an individual State, or the U. S. and the Citizens of an individual State,"

which proposition was rejected by the Convention and the word "all" intentionally omitted from the second class, and placed in the first class. The words

> "* with such Exceptions, * * as the Congress shall make"

could not be held to authorize Congress to except any of the cases of the first class, specified in Section 2 of Art. III of the Constitution, for such holding would create the want of grammatical sequence or coherence in three phrases of said section, or result in the use of an anacolution in three constitutional phrases. This consideration occasioned the construction in *Martin* v. *Hunter,* 1 Wheat. 304, as to the word "all", l. c. 333, 334, 335, 336, having been dropped from the second class "seemingly *ex industria*"; that in *Cohens* v. *Virginia,* 6 Wheat. 265, l. c. 378-379, pointing out that the

> "* clause extends the jurisdiction of the court to all the cases described, without making in its terms any exceptions whatever, *

and that

> "If there be any exception, it is to be implied against the express words of the article,"

and l. c. 423:

> "* the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*"

in which it was held, l. c. 336:

> "* as to the other cases of the second class, they might be left to be exercised under the *exceptions* and regulations which Congress might in their wisdom choose to apply,"

and which case was discussed and followed in *The Moses Taylor* v. *Hammons,* 4 Wall. 411-431, and *Williams* v. *United States,* 289 U. S. 553-581, l. c. 572. Petitioner's reply brief, pages 109 to 122, fully discusses said opinions, to which attention is now called.

8. The rejection by the Convention of a motion, proposition or resolution seeking to give power to Congress

to enact Section 1254 (1), Title 28, U. S. C., as construed by this Court in its order denying petition for certiorari, establishes the truth that the Convention never intended that Congress should have such power. It has ever been the rule that rejection by the Convention of any motion, proposition or resolution made by a member thereof has always nullified every contention to the effect that the rejected proposition could be held to be part of the Constitution. Witness Daniel Webster in his reply to Calhoun as to the Constitution being a compact at page 447 of Porter & Coates Speeches of Daniel Webster:

> "If, sir, any historical fact in the world be plain and undeniable, it is that the convention deliberated on the expediency of continuing the confederation, with some amendments, and rejected that scheme, and adopted the plan of a national government, with a legislature, an executive, and a judiciary of its own. They were asked to preserve the league; they rejected the proposition. They were asked to continue the existing compact between states; they rejected it. They rejected compact, league, and confederation, and set themselves about framing the constitution of a national government; and they accomplished what they undertook."

The following appears from the record of the Convention on August 27, 1787:

> "The following motion was disagreed to, to-wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct'."
>
> (United States, Formation of the Union, page 625.)

The rejection of said motion, by the Convention, to substitute the words

> "* the Judicial power shall be exercised in such manner as the Legislature shall direct"

for the words

> "* the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"

has made definite and certain the meaning of the constitutional language and the insufficiency of said Section 1254 (1), Title 28, U. S. C., to authorize this Court to except this case from the appellate jurisdiction thus constitutionally vested in this Court.

That the Convention was engaged in making the Constitution certain by striking and inserting words in the proposed draft of the Constitution between August 6, 1787, and September 17, 1787, when it was completed, is further shown by the record of its proceedings on Tuesday, August 28, 1787, as to which the record recites:

> "It was moved to strike out the words 'it shall be appellate' & to insert the words 'the supreme Court shall have appellate jurisdiction,'—in order to prevent *uncertainty* whether 'it' referred to the *supreme Court,* or to the *Judicial power.'*

Of the 10 States represented, 9 voted "Ay" and 1 "no."

9. The importance of this case compels petitioner to call the Court's attention to Clause 3 of Article VI of the Constitution providing that

> "* all * * judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; *"

(See United States, Formation of the Union, Documents illustrative of the Formation of the Union of the American States, Published 1927 by the Government Printing Office, under the Supervision of the Director of the Library of Congress, pages 625 and 626.)

Said clause imposes the duty on each and all of the Justices of this Court, both individually and collectively, and as a Court, to now take jurisdiction of the question raised by this petitioner for a rehearing as to the validity of said Section 1254 (1), Title 28, U. S. C., as construed and applied by this Court in its order denying the writ prayed, and to decide whether or not said statute was enacted "pursuant to the Constitution," or in violation thereof. The order denying certiorari involved the construction of said statute to the effect that it conferred power on this Court to except this case from the appellate jurisdiction of this Court. Since said statute, as thus construed, attempts to invest this Court with power to make exceptions to the appellate jurisdiction vested in this Court by the Constitution—which power to make exceptions to said appellate jurisdiction, if any, is vested only in the Congress a constitutional question of the gravest importance is presented.

In Zane's The Story of Law, pages 197-198, it is said:

> "It has been stated before that the failure of Greek law was in its inability to discover a tribunal competent to expand, administer, and apply the private law among even its own citizens. This failure arose both from the popular nature of the tribunals and from the want of a legal professional class. It remained in the evolution of law for the Roman to develop this competent tribunal and a powerful profession. The result was that among the Romans there was a rule of law. Among them it was not possible to have a condition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, *only when it seemed proper to apply it.*" (Italics ours.)

The authority above quoted, John M. Zane, is a legal historian and author whose standing has been recognized

by approved legal scholars, amongst whom is the illustrious Charles Warren, whose research enabled this Court to correct the almost century old rule in *Swift* v. *Tyson*. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, l. c. 72-73—and who, at pages 20 and 30 of his History of the American Bar, cites "The Five Ages of the Bench and Bar of England" by John M. Zane.

Conclusion.

For the reasons set forth above, and in the petition for certiorari, it is respectfully urged that a rehearing be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Kansas City, Missouri, October 17, 1951.

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vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING.

Petitioner prays leave to file a second petition for a rehearing herein for the reasons stated in the copy thereof attached hereto and made a part hereof.

MARTIN J. O'DONNELL,

Attorney for Petitioner.

PETITION FOR REHEARING.

I.

This petition is presented in accordance with the practice followed in *Stone* v. *White,* where certiorari was denied at the 1935 Term, 296 U. S. 596, 56 S. Ct. 112, 80 L. Ed. 422, but the time to file a petition for rehearing was extended until November 2, 1936, 298 U. S. 646, 56 S. Ct. 950, 80 L. Ed. 1377. Although the petition for rehearing was then denied, 299 U. S. 622, 57 S. Ct. 228, 81 L. Ed. 458, later in the 1936 term the petitioner moved for leave to file another petition for rehearing on the ground that a conflict of circuits had arisen. The Court granted the motion and granted certiorari. 300 U. S. 643, 57 S. Ct. 610, 81 L. Ed. 858.

The opinion in said case (301 U. S. 532) after argument states, l. c. 533:

> "We granted certiorari, 300 U. S. 643, *ante,* 858, 57 S. Ct. 610, because of the conflict of the decision below with that of the Court of Appeals for the Third Circuit, *United States* v. *Arnold,* 89 F. (2d) 246."

In *Stefanelli* v. *Minard,* No. 2 October Term 1951, 20 Law Week 4035—decided after the petitions for certiorari and rehearing herein—were denied, this Court construes the criminal and civil variety of the Civil Rights Acts with the same measuring rod, and in Note 12 refers to a case in the Sixth Circuit, and another in the Third Circuit, as authorizing damages under said Civil Rights Acts:

> "• • • where the fairness of state court proceedings has been attacked in the lower federal courts under R. S. sec. 1979 and related sections."

Then, using the words "But see," said Note 12 calls attention to cases from the Fifth, Seventh, Ninth and Tenth Circuits directly in conflict with the said decisions of said Sixth and Third Circuits.

Since the fairness in this case of state court proceedings was attacked in the District Court for the Western District of Missouri, and in the U. S. Court of Appeals for the Eighth Circuit—the truth of which charges were conclusively admitted by the motions to dismiss, which were sustained and judgment entered, then the decision of the Eighth Circuit as reflected in its opinion, showing that the fairness of the state court proceedings was attacked in that court and the lower court under Section R. S. 1979, and related sections is in direct conflict with said decisions of said Sixth and Third Circuits, and necessitates the issuance of the writ herein under the time-honored rules of this Court never better stated than in *Forsyth* v. *Hammond,* 166 U. S. 504, l. c. 512, when, in construing the certiorari statute, this Court said:

> "Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision."

And in *Magnum Import Co.* v. *De Spoturno Coty,* 262 U. S. 159, l. c. 163, Chief Justice Taft for the Court said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And so, under the statute under which this Court is now proceeding, this case is an ideal case for the utilization of the Court's discretion to settle the conflict, which said Note 12 embodied as a part of the opinion of this Court has found to exist, wherein the circuits which conflict includes that shown by the opinions in said Sixth and Third Circuit cases and the opinion in this case to-wit: *Moffett* v. *Commerce Trust Co.,* 187 Fed. 2d 242.

II.

Another reason for granting leave to file this petition for rehearing, and granting same, is the intervening circumstance of substantial and controlling effect that this Court on June 2, 1952, in its decision in the Steel Cases, Nos. 744 and 745, October Term 1951, has destroyed the doctrine of State Necessity reflected in the Stefanelli opinion, if it applied the law in that case to remedy the injustice done to petitioners whose basic rights were invaded, such application

> "* * * would invite a flanking movement against the system of state courts by resort to the federal forum, with review if need be to this Court to determine the issue. * * * the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' *Screws* v. *United States,* 325 U. S. 91, 108. Only last term we reiterated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to upset the federal system.' *Collins* v. *Hardyman,* 341 U. S. 651, 658."

For the Constitution did not authorize this Court, on the ground of state necessity, as there expressed, to nullify the Civil Rights Acts, either in a civil or criminal

case, or by excepting this case from its appellate jurisdiction, under the age-old rule binding all courts, well stated in *Rex* v. *Wilkes,* 20 Howell's State Trials 1112, as follows:

> "The Constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences how formidable soever they might be; if rebellion was the certain consequence, we are bound to say *Fiat justitia ruat coelum.*"

Which said principle was made applicable to the inhabitants of Missouri in *State* v. *Fry,* 4 Mo. 1. c. 193, where its Chief Justice answered a contention that state necessity should control rather than the law, saying:

> "One answer to this argument should be, the courts are bound to do their duty under the law and the constitution and should say as Lord Mansfield said in the case of the *King* v. *Wilkes* '*Fiat justitia ruat coelum.*' "

Said decision in the Steel Case has conclusively and permanently established, for all time, that the Constitution binds the President, the Congress and the Supreme Court. Consequently, the matter stated in the petition for rehearing, now made part hereof (but overruled on November 13, 1951) when supported by the doctrines stated in the opinion in the Steel Case, necessitates a holding that the Congress only can make exceptions to the appellate jurisdiction vested in this Court by Section 2 of Article III of the Constitution, and that this Court is itself powerless to exercise its discretion to except this, or any other, case from its appellate jurisdiction.

Since the Congress alone was given the power by the words in Section 2 of Article III of the Constitution

> "• • • with such exceptions and under such regulations as the Congress shall make"

to except this case from the appellate jurisdiction of this Court, then the power of Congress was exclusive and could not be delegated to this Court under the law stated in *Williams* v. *United States*, 289 U. S. 533-581, l. c. 580:

> "• • • it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands*, 277 U. S. 189, 201, 202, 72 L. Ed. 845, 48 S. Ct. 480." (Italics the Court's.)

Said Stefanelli decision conclusively established that the two first cases cited in its Note 12 of the opinion are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Moffett* v. *Commerce Trust Co.*, 187 F. 2d 242, Rule 38, paragraph 5 (b), providing:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter;"

is controlling herein and compels the grant of the writ.

The decision in the Steel Cases on June 2 contradicts the idea expressed in the Stefanelli case, that state necessity justifies a denial of the protection and benefit of a United States statute, and has given effect to the United States Constitution and laws and to the fundamental principle stated in *Ex parte Milligan*, 4 Wall. 2, l. c. 121, when it pointed out that state necessity does not authorize

this, or any other federal court, to deny effect to that leading and fundamental principle by declaring:

> "• • • the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."

In the Steel cases, this Court points out that prior erroneous decisions of this Court did not warrant the decision sought by the Government in that case, declaring:

> "But even if this be true Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any department or officer thereof.'
>
> "The founders of this nation entrusted the law-making power to the Congress alone in both good and bad times."

The principle applied in ascertaining the limitations of the President's Constitutional powers in the opinion, to-wit:

> "• • • he shall take care that the laws be faithfully executed"

and that by reason thereof:

> "• • • in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law maker."

is of controlling force herein, for measured by the same yardstick, the following sentence in Section 2 of Article III of the Constitution:

> "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both

> as to law and fact, with such exceptions and under such regulations as the Congress shall make."

expressly excludes the idea that this Court is to be a law maker as to its own appellate jurisdiction.

Since the Constitution contemplated that only the Congress could except any case reaching this Court from its appellate jurisdiction, then the Congress could not vest this Court with power to be a law maker and vest in its discretion to make the exceptions which the Constitution fastened upon Congress alone.

For the reasons set forth above, and in the petition for certiorari, it is respectfully urged that a rehearing be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Kansas City, Missouri, June 5, 1952.

End